No. 600

IN THE

Supreme Court of the United States

October Term, 1936

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

GEORGE W. NORRIS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT

The statement by petitioner that "in consideration for filing in opposition to Senator Norris the respondent was paid $50.00 to cover his filing fee and was given $500.00 for campaign expenses," is a conclusion not justified by the evidence.

The true facts are that respondent, on June 25, 1930, forwarded to a friend in Lincoln, Nebr., his application as a candidate for Railway Commissioner of the State of

Nebraska, which act was of his own volition and choice (R. 43).

Five days later Hugh Drake, one of the Railway Commissioners of the State of Nebraska, and who was a candidate for re-election, his brother Oscar Drake, Victor Seymour, and A. Paul Johnson, an attorney of Broken Bow, Nebr., conferring together in a hotel room at Kearney, Nebr., arranged that Johnson should confer with respondent and request him "not to file as a candidate for Railway Commissioner but to file for the United States Senate," offer to pay his filing fee of $50 and his campaign expenses estimated at $500 (R. 34-38).

The next day Johnson told respondent about this conference, "that Mr. Seymour stated he was prominent in the Republican party nationally," that he requested respondent "not to file as a candidate for Railway Commissioner but to file for the United States Senate," that his filing fee of $50 and campaign expenses estimated at $500 would be paid and "the Republican party would support him" (R. 35).

A few days later respondent forwarded to the Secretary of State his application "requesting that his name be placed upon the official primary ballot of the Republican party for the primary election to be held August 12, 1930, as a candidate for Senator of the United States for Nebraska" (R. 29).

Respondent testified, and there was no evidence in denial, that his acts in the matter were "in good faith and felt that with the promise of support he had a chance to win the nomination." Upon sending his application to the Secretary of State he resigned his position in the store in which he was employed (R. 44).

The Secretary of State received his application 38 days and not 40 days, prior to the primary election, as required by the Nebraska Statute. On July 18, 1930, a judgment of the Supreme Court of Nebraska was entered finding that this application was not filed "within the time required by law" and it ordered the Secretary of State to "omit from the list of candidates for United States Senator" the name of respondent (R. 40).

The record discloses no campaign nor any act which could be construed as part of a campaign by respondent.

More than two months after the Supreme Court had entered its judgment, respondent was called as a witness before a Senate Sub-Committee and the indictment charges that he falsely testified that he did not "receive any money from anybody in the *campaign,*" nor any assurance of financial support or backing (R. 89).

A. Paul Johnson had testified before the same Sub-Committee that he had not paid respondent anything and had no knowledge that respondent had received any contribution (R. 37). He returned to the witness stand and corrected his testimony.

Then respondent voluntarily returned to the witness stand, stated he would make a few changes in his testimony "as Mr. Johnson has," and he related then what occurred as to the payment of his filing fee, the receipt of a bond for $500, and the assurance he had been given as to financial support and backing (R. 47, 48).

The trial court declined to direct a verdict for respondent and refused to instruct the jury that one who corrects his testimony while the matter is yet pending, is not guilty of perjury (R. 60, 61).

(Where italics are used, they are by the author of the brief.)

The Circuit Court of Appeals reversed the judgment of conviction on account of this failure to so instruct the jury (R. 69-73).

SUMMARY

I. The crime of perjury under the Criminal Code, Section 125 (Title 18, Section 231, U. S. C. A.), is a statutory adoption of the common-law offense of perjury, with no material change.

II. When Congress adopts a common-law offense, without an indication of an intention to give a new significance to the offense, the common-law definition must obtain.

III. The whole of the evidence of a witness is to be taken together and if the testimony be ultimately true, an indictment cannot be predicated thereon. The law encourages the correction of even intentionally false testimony and holds out every inducement to a witness to tell the truth without running the risk of being indicted and convicted for perjury.

IV. If a writ of certiorari be granted, the entire record is before this Court and it may proceed to a complete decision and enter the judgment which should have been rendered by the court below on the record then before it.

V. Congress has no power to legislate for the purpose of regulating primary elections.

VI. The inquiries complained of in the indictment herein were immaterial matters so far as the Senate

Committee in question was concerned. This Committee acted under a Senate Resolution authorizing only the investigation of "*campaign expenditures of the various candidates for the United States Senate.*" The respondent was not a candidate nor did the inquiry pertain to any incidents in connection with the candidacy or campaign of any of those who were candidates. The inquiries upon which the indictment is based referred solely to the campaign of respondent. The evidence contained no reference to any campaign by respondent, nor any incident which might be said to be a part of a campaign.

VII. To constitute perjury, it is essential that the oath be taken in a "case in which a law of the United States authorizes an oath to be administered."

The points raised in numbers V, VI, and VII of this summary were raised in the trial court and in the Circuit Court of Appeals, by demurrer (R. 11-13), by motions for directed verdict (R. 40, 48), by motion for new trial (R. 15), and by assignments of error. They present added reasons for sustaining the judgment of the Circuit Court of Appeals, and each of these three reasons also justify a dismissal of this prosecution.

ARGUMENT

I.

The Crime of Perjury Under United States Criminal Code Is Merely a Statutory Adoption of the Common-Law Offense

The crime of perjury as defined in Section 125 of the Criminal Code (Title 18, Sec. 231, U. S. C. A.), quoted

on page 2 of petitioner's brief, is merely a statutory adoption of the common-law offense of perjury, with no material change. This is recognized by petitioner at page 8 of its brief in describing the crime charged against the defendant as being "perjury, an old common-law offense."

Petitioner's argument is premised on the statement that Section 125 of the Criminal Code is silent on the matter of "subsequent correction" of testimony. In such silence, the Criminal Code follows precisely the common-law definition of perjury, as do other legislative definitions by the various states.

Blackstone defines perjury as:

> "A crime committed when a lawful oath is administered in some judicial proceeding, to a person who swears willfully, absolutely, and falsely in a matter material to the issue or point in question."
>
> 4 Cooley's Bl. Com. 137.

Definitions by Lord Coke and Hawkins are of like effect.

> 3 Coke Inst. 164.
>
> Hawkins P. C. lib. c. 69 s. 1.

With reference to a state statute defining perjury, which is comparable to Section 125 of the Criminal Code, the Supreme Court of Washington said:

> "Our statutory definition of perjury does not differ materially from the definitions found in Hawkins, Bacon, Blackstone, and other common-law writers."
>
> *State v. Eaid,* 55 Wash. 302, 104 Pac. 275, 33 L. R. A. N. S. 946.

And with reference to an act of Congress defining the crime of false swearing, also recognized at common law as an offense distinct from perjury, this Court, in an opinion by Justice Story, said:

> "The act does no more than change a common-law offense into a statutory offense."
>
> *United States v. Bailey*, 9 Peters 238, 34 U. S. 113.

Likewise, it is clear, the crime of perjury under the above Criminal Code is, so far as this case is concerned, identical to the common-law crime of perjury.

Therefore, the Circuit Court of Appeals was quite right in following the uniform holding of the decisions in the cases described by petitioner as "common-law cases decided by the English and state courts" as to the effect of a "subsequent correction" or testimony upon the existence of the crime of perjury at common law and under statutes following the common-law definition of perjury.

II.

When Congress Adopts a Common-Law Offense, the Common-Law Interpretation Thereof Obtains

When Congress adopts a common-law offense, without an indication of an intention to give a new significance to the offense, the common-law definition must obtain.

This principle was stated in *United States v. Cardish*, 143 Fed. 640, where the Court said:

> "The rule seems to be well settled that when Congress by statute refers to or adopts a common-

> law offense, without further definition, the common-law definition must obtain. Re Green (C. C.) 52 Fed. 104, 111."

In the case cited of *In re Green*, 52 Fed. 104, the second syllabus reads in part:

> "when congress adopts or creates a common-law offense, the courts may properly look to the common law for the true meaning and definition thereof, in the absence of a clear definition in the act creating it."

In *United States v. Palmer*, 3 Wheat. 630, 4 L. Ed. 471, this Court, in an opinion by Chief Justice Marshall said that the term robbery "must be understood in the sense in which it is recognized and defined at common-law."

In *United States v. Trans-Missouri Freight Association;* 166 U. S. 290, at page 353, 17 Sup. Ct. 540, at page 563, the dissenting opinion of Justice White reviews certain principles as to which there was no dispute in that case, as follows:

> "The well-settled rule is that where technical words are used in an act, and their meaning has previously been conclusively settled by long usage and judicial construction, the use of the words without an indication of an intention to give them a new significance is an adoption of the generally accepted meaning affixed to the words at the time the act was passed. Particularly is this rule imperative where the statute in which the words are used creates a crime, as does the statute under consideration, and gives no specific definition of the crime created."

This principle was applied by this Court to the interpretation of the specific perjury statute involved herein,

in *Hammer v. United States*, 271 U. S. 620, 46 Sup. Ct. 603, where this Court, per Justice Butler, said:

> "The general rule in prosecutions for perjury is that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment as perjury. The application of that rule in federal and state courts is well nigh universal."

It is to be noted that the perjury statute does not refer in any way to the number of witnesses required to prove the falsity of testimony and the above holding of this Court constitutes the following of a rule of law well established with reference to the proof required to establish the crime of perjury. The absence of any mention in the Criminal Code of anything upon this point is held by this Court to constitute an acceptance by Congress of the rule stated in the opinion in the above case, thus:

> "The rule has long prevailed, and no enactment in derogation of it has come to our attention. The absence of such legislation indicates that it is sound and has been found satisfactory in practice."

The same conclusion and effect must be deduced from the absence in the perjury statute of specific mention of "subsequent correction" of testimony and in line with the above principle it must follow that the uniform and long established rule with reference to the "subsequent correction" of testimony must logically be the rule of decision upon this point.

III.

The Whole of the Evidence of a Witness Is to Be Taken Together and if the Testimony Be Ultimately True, an Indictment Cannot Be Predicated Thereon

In 1790 Lord Kenyon said in *King v. Jones,* 1 Peakes Report 37:

> "The whole of the defendant's evidence on the former trial should be proved, for if in one part of his evidence he corrected any mistake he had made in another part of it, it will not be perjury."

And Judge Faris in deciding this case below said:

> "If what he last swore comprehends a full correction, his last testimony comprises the ultimate facts in the case, so far as the witness is concerned." (R. 71.)

In fact a corrected mis-statement forms no part of the evidence after the correction is made. It is no longer the assertion of a fact.

Even if the testimony of the witness was intentionally false, yet if he correct it while the matter is still pending, he is not guilty of perjury. The law encourages the correction of even intentionally false testimony. As was said in *People v. Gillette,* 126 App. Div. N. Y. 665, 111 N. Y. S. 133, "A judicial investigation or trial has for its sole object the ascertainment of the truth, that justice may be done. It holds out every inducement to a witness to tell the truth by inflicting severe penalties upon those who do not. This inducement would be destroyed if a witness could not correct a false statement except by

running the risk of being indicted and convicted for perjury."

People v. Brill, 165 N. Y. S. 65.
People v. Gillette, 126 App. Div. 665, 111 N. Y. S. 133.
Brannan v. State, 94 Fla. 565, 114 So. 429.
Henry v. Hamilton, & Blackf. (Ind.), 506 (Nov. term 1845, Supreme Court of Indiana).
Commonwealth v. Irvine, 14 Pa. Dist. and County Reports 275.
King v. Carr, 1 Siderfin's Reports 418.
King v. Jones, 1 Peakes Report 37.
Bishop's New Criminal Law (9th Ed.), Sec. 1044a.

"Even a bona fide but incompleted attempt to correct false testimony may show absence of the criminal intent essential to perjury."

48 Corpus Juris 282.

The administration of justice will best be served by encouraging a witness to correct his testimony while the matter is yet pending in order that the truth be ultimately established in the very proceeding. But if a witness dare not correct either inadvertent or intentional mis-statements, without running the risk of prosecution and punishment, the administration of justice will be greatly hindered.

The Solicitor General, in his brief says that "the decision (below) presents an alarming obstacle to effective judicial, legislative, and administrative investigation." In this, we think he clearly errs. The alarming obstacle would be created if no witness could correct his testimony while the matter was yet pending.

Furthermore, the rule contended for by the Solicitor General would extend criminal responsibility beyond the

terms of the present perjury statute and would deprive the defendant of the established rules of law which have been in existence for nearly 300 years.

If Congress intended that perjury should exist notwithstanding the correction of erroneous testimony, it must be presumed, in view of the unanimity of decisions upon the point, that it would at sometime have so specifically provided in the perjury statute.

After all this lapse of years, if the Solicitor General feels that the long established rule should be changed, he should address his plea to Congress.

The Solicitor General is in error on pages 7 and 8 of his brief where he states that in *Seymour v. United States*, 77 Fed. (2d) 577, it was held that "Seymour's subsequently telegraphed offer to correct his testimony did not condone his perjury." The telegram in question is contained on pages 581-2 of the opinion. As to this the court below said:

> "In fact, his telegram, to the Committee does not by its language amount to a request that he be allowed to correct anything he had theretofore sworn to, nor is there any admission or intimation in it that he had sworn falsely. So, it did not even constitute 'a *bona fide* but incompleted attempt to correct false testimony.' At best, it simply indicated his willingness, at his own convenience, to give further testimony; whether true or false, does not appear." (R. 71.)

There are other errors in the brief of petitioner. On page 6 it is stated that "the court below relied upon several common-law cases cited by the English and state courts." It so happens, however, that these cases dealt

both with the crime of perjury as defined under the common law and also with state statutes defining perjury, which like the Federal Perjury Statute, followed the common law.

The author of the brief is also in error in saying that in each of these cases perjury was corrected not "after an interval," etc. In some of these cases an interval of several weeks had transpired. The true test laid down in these cases is that the correction must be made while the matter is yet pending. In other cases witnesses have corrected their testimony after the matter has been determined. In these cases it is held that the correction avails the witness nothing.

Counsel for petitioner cites two cases to uphold his position, but neither apply. In fact, the first case cited, *In the Matter of Popper,* 193 App. Div. N. Y. 505, sustains the position of respondent rather than of petitioner. This was a disbarment proceeding against one Popper and the proof showed that the next day after he had testified falsely, he returned to the witness stand and corrected his testimony. His counsel cited the case of *People v. Gillette,* 126 App. Div. 665, 111 N. Y. S. 133, and claimed that respondent, by correcting his testimony, "did not commit perjury." The court said:

> "It is of little moment whether respondent was guilty of technical perjury or not.
>
> "This proceeding is not a criminal prosecution."

There is no statement in this decision that detracts one iota from the rule laid down in the Gillette case.

The other case cited in brief of petitioner, *Martin v. Miller,* 4 Mo. 39 (decided in 1835), was a civil action for

slander with no question of perjury involved. Neither was there, in the opinion, any reference to or discussion of the authorities even then existing, upon the matter of the correction of testimony.

The decision of the court below does not, as the Solicitor General says on page 5 of his brief, fly "in the teeth of Section 125 of the Criminal Code," but rather the conclusion of the Solicitor General, that one who does correct his testimony is still guilty of perjury, flies in the teeth of the long established law on this subject.

Counsel in the brief also say that "the decision below, unless corrected, would tend to reduce the perjury statute to a status * * * of practical impotence" (page 8). But it appears, however, that in not far from 300 years there are to be found in the reports not more than seven cases where the defense has been that there was no perjury because the witness corrected his testimony while the matter was yet pending. If this construction had reduced the perjury statute to a status of impotence, or had not been found "sound" and "satisfactory in practice," some legislative body, long before this time, would have corrected it by amendment of the statute.

And we think the Government recognized the existence of this rule in this case, for though the indictment was returned on June 23, 1931, the Government did not see fit to cause this case to be brought on for trial until in December, 1935. The Government was no doubt encouraged to try the case at that time by reason of the statement quoted at the top of page 8 of petitioner's brief from the decision of the Circuit Court of Appeals, in *Seymour v. United States*, 77 Fed. (2d) 577, which was decided April 22, 1935.

The court below, however, did not hesitate to say that the statement quoted from the Seymour case was "*obiter dictum* merely" and "in fairly direct contradiction to what we deem to be the true rule of law" (R. 70-71).

It thus appears that all reported decisions are to this one effect and there has never been any indication in any decisions of this Court or any of the reported decisions in any court in England or America, of any dissent from the uniform rule above stated, which had its origin as early as 1660.

Thus a rule of uniformity has been established which neither Congress nor the legislature of any state has ever sought to change. And the petitioner herein has not shown any question of such peculiar gravity or general importance as to justify the granting of a writ of certiorari herein, which is only granted under special circumstances "to secure uniformity of decision and to bring up cases of importance, which it is in the public interest to have decided by the court of last resort." Such jurisdiction is exercised sparingly.

Hamilton Brown Shoe Co. v. Wolf Bros. & Co., 240 U. S. 251, 36 Sup. Ct. 269.

State of Ohio ex rel. Seney v. Swift & Co., 260 U. S. 146, 43 Sup. Ct. 22.

Magnon Import Co. v. Coty, 262 U. S. 159, 43 Sup. Ct. 531.

Respondent therefore urges that the writ should be denied. If, however, this Court grants this writ, respondent has other and additional grounds, which were presented in both the trial court and the Circuit Court of Appeals, which would also justify the judgment of reversal entered by the Circuit Court of Appeals.

IV.

If Writ of Certiorari Be Granted, This Court May Proceed to a Complete Decision of the Case

On certiorari to review judgments of the Circuit Court of Appeals, "the entire record is before this Court" and it may "proceed to a complete decision" and "enter the judgment which should have been rendered by the court below on the record then before it." Respondents may urge additional grounds to sustain the judgment of the lower court, and need not file a cross-petition for certiorari.

Langness v. Green, 282 U. S. 531, 51 Sup. Ct. 243.

Story Parch. Co. v. Patterson Parch. Paper Co., 282 U. S. 555, 51 Sup. Ct. 248.

Cole v. Ralph, 252 U. S. 286, 40 Sup. Ct. 321.

Title 28, Section 347, U. S. C. A., reads in part:

> "(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

Therefore, if the writ be granted herein, we urge the following grounds as additional reasons for upholding the judgment of reversal entered by the Circuit Court of Appeals and which respondent insists also require a dismissal of this prosecution.

V.

Congress Has No Power to Legislate for the Purpose of Regulating Primary Elections

The record herein shows that the matters concerning which the respondent testified and for which he was indicted, dealt solely with a primary election to be held within the State of Nebraska on August 12, 1930. At this election the political parties, Republican or Democratic, would choose their respective candidates for various offices, including United States Senator. It was clearly and exclusively a state election conducted under the provisions of sections 32-1140, et seq., Comp. St. of Nebr. 1929.

There are separate ballots for each political party. The voter declares his politics and is given a ballot of the party to which he belongs. It is in reality a party election under state supervision whereby the political parties nominate their candidates for the respective offices.

The Senate resolution under which the Sub-Committee purported to act was Senate Resolution No. 215, dated April 10, 1930, and as far as material, reads:

> "Resolved, That a special committee, consisting of five Senators, to be appointed by the Vice-President, is hereby authorized and directed to investigate the *campaign expenditures* of the various *candidates* for the *Unites States Senate*, the names of the persons, firms, or corporations subscribing, the amount contributed, the method of expenditure of said sums and all facts in relation thereto, not only as to the subscriptions of money and expenditures thereof but as to the use of any other means or influence, including the promise or use of patronage, and all other facts in relation thereto which would not only be of

public interest but which would aid the Senate in enacting any remedial legislation or in deciding any contest which might be instituted involving the right to a seat in the United States Senate.

"The investigation hereby provided for, in all the respects above enumerated, shall apply to *candidates* and contests before Senatorial primaries, senatorial conventions, and the contests and campaign terminating in the general election in November, 1930."

That the Committee had no authority to conduct inquiry to ascertain facts which would be, as stated in the resolution "of public interest," is well settled by the decisions of this Court wherein it has been held that:

"Neither branch of the legislative department, • • • possesses, or can be invested with, a general power of making inquiry into the private affairs of the citizen."

Sinclair v. United States, 279 U. S. 263, 49 Sup. Ct. 268.
Kilbourn v. Thompson, 103 U. S. 168, 26 L. Ed. 377.
McGrain v. Daughterty, 273 U. S. 135, 47 Sup. Ct. 319.

The next subject covered by the Senate Resolution was the matter of aiding "the Senate in enacting any remedial legislation." But every incident referred to in the evidence pertained to the primary election to be held in Nebraska in 1930. It is now settled, however, that Congress has no power to legislate for the purpose of regulating primary elections.

Newberry v. United States, 256 U. S. 231, 41 Sup Ct. 469, 65 L. Ed. 913.

The third and last matter mentioned in the Resolution was to aid the Senate "in deciding any contest which

might be instituted involving the right to a seat in the United States Senate." The record discloses that the application of respondent was not filed with the Secretary of State within the time required by law and the Supreme Court ordered that his name be omitted from the list of candidates on the primary election ballot (R. 40). At most it was an abortive effort of respondent to become a candidate. There could, therefore, never be a contest involving the right to a seat in the United States Senate because more than two months prior to the time that respondent was called as a witness before this Sub-Committee, the Supreme Court of Nebraska had ordered his name omitted from the ballot and the primary election, without the name of respondent upon the ballot, had been held forty days before respondent gave the testimony complained of in the indictment.

Furthermore, the power to take testimony to aid the Senate in determining a contest involving the right to a seat in the United States Senate applies not to a remotely anticipated contest and particularly in a case where the inquiry pertains solely to one who was not even permitted to be a candidate before the primary election, but applies to a contest then existing.

Kilbourn v. Thompson, 103 U. S. 168, 26 L. Ed. 377.

Here this Court said:

> "Where the question of such impeachment *is before either body acting in its appropriate sphere* on that subject, we see no reason to doubt the right to compel the attendance of witnesses, and their answer to proper questions, in the same manner and by the use of the same means that courts of justice can in like cases."

In *Morris v. United States* (C. C. A. 7), 261 Fed. 175, the Court said:

> "But to make out a case of perjury another element must be established. The government must show the false testimony was relevant to a *material issue in controversy.*"

VI.

Materiality

The Senate Resolution in question only authorized its Committee to investigate "the campaign expenditures of the various candidates for the United States Senate" (R. 26). The respondent never became a candidate for the United States Senate. At most he transmitted his request that he be permitted to become a candidate and on July 18, 1930, the Supreme Court of Nebraska denied the request.

The indictment alleges that on September 22, 1930, more than two months after the Supreme Court had ruled that respondent could not be a candidate, the respondent falsely testified that he "had not received any money from anyone *in this campaign*" and "had received no assurance from anyone of financial support and backing, or of help in financing *his campaign as a candidate* for the United States Senate." The four questions and answers, which are the basis for the indictment as tried, are as follows:

> "Q. Now what assurance did you have of financial support and backing? A. None whatever.
>
> Q. In your campaign? A. None whatever.
>
> * * * * *
>
> Q. Did you get any assurance from anybody that they would help you—Republican, Democrat, inde-

pendents, or anybody say they would help to finance your campaign? A. No, sir.

* * * * *

Q. Did you receive any money from anybody in the campaign? A. I did not." (R. 32-33.)

Not only was the respondent not a candidate, but the evidence discloses no incident that could in any way be said to be a part of any campaign, this word being defined in Webster's International Dictionary as:

> "A connected series of operations to bring about some desired result. * * * Politics, an organized series of operations or a systematic effort to influence voters, carried on before an election."

The evidence does not contain a word to indicate that either Senator George W. Norris or W. M. Stebbins, who were the only candidates for nomination at this primary election, had anything whatsoever to do with the events shown in the record, or with the funds paid to respondent. The indictment was therefore based upon inquiries that in no wise pertained to a candidate and were therefore wholly immaterial.

Furthermore, there was no campaign nor any part of a campaign by respondent. So far as respondent was concerned any candidacy by him or any campaign, were non-existing things. To convict one of perjury the evidence "must be strong and clear."

Phair v. United States (C. C. A. 3), 60 Fed. (2d) 953.

Not having any campaign, the respondent's answer to the questions were legally truthful and he therefore cannot be held for perjury.

United States v. Slutzki (C. C. A. 3), 79 Fed. (2d) 504.

To make out a case of perjury "the Government must show the false testimony was relevant to a material issue in a controversy."

The Federal Perjury Statute, Title 18, Sec. 231, U. S. C. A.

Morris v. United States (C. C. A. 7), 261 Fed. 175.

United States v. Rhodes, 218 Fed. 518.

But the evidence of the Government in the trial of this case indicated nothing relevant or material to any question in which the United States Senate could properly be interested. The respondent had sent his papers to Lincoln, Nebraska, to file as a candidate for State Railway Commissioner. This no doubt came to the notice of Hugh Drake, the Railway Commissioner, who was a candidate for re-election, and the events narrated in the evidence pertained exclusively to the efforts of Railway Commissioner Drake, his brother and two associates, to prevent respondent from proceeding with his plans to be a candidate for Railway Commissioner by persuading him instead to file as a candidate for the United States Senate.

VII.

To Constitute Perjury It Is Essential That the Oath Be Taken in a "Case in Which a Law of the United States Authorizes An Oath to Be Administered." The Charge of Crime Must Have Clear Legislative Basis

Both at common law and under the Criminal Code the oath must be taken in a proceeding authorized by law. Blackstone, Lord Coke, and Hawkins all define perjury as arising in some "judicial proceeding" or "any

proceeding in a court of justice." The perjury statute, Section 125 of the Criminal Code (Title 18, Sec. 231, U. S. C. A.) is limited to "any case in which a law of the United States authorizes an oath to be administered."

This Court held, in the case of *United States v. George,* 288 U. S. 14, 33 Sup. Ct. 412, which was a prosecution under this same perjury statute:

> "Where the charge is of crime, it must have clear legislative basis."

The resolution under which the Committee in question functioned was only a Senate resolution and it was not a law. Congress alone is vested with legislative powers.

Art. 1, Sec. 1, United States Constitution.

Art. I, Sec. 8, Clause 18, United States Constitution.

To constitute perjury the proceeding, the occasion or purpose of the investigation, must be shown to be one authorized by law.

United States v. George, 228 U. S. 14, 33 Sup. Ct. 412.

United States v. Robertson, 257 Fed. 195.

United States v. Maid, 116 Fed. 650.

Patterson v. United States (C. C. A. 9), 181 Fed. 970.

United States v. Bedgood, 49 Fed. 54.

United States v. Mamon, 44 Fed. 800.

United States v. Dupont, 176 Fed. 823.

State v. Larson, 171 Minn. 246, 213 N. W. 900.

Commonwealth v. Hillenbrand, 96 Ky. 407, 29 S. W. 287.

Respondent, therefore, respectfully submits that the petition for writ of certiorari should be denied. If, however, this Court does take jurisdiction of this cause, respondent urges that the ruling of the Circuit Court of Appeals complained of herein by petitioner, be affirmed and its action in reversing the judgment of the trial court also upheld and this prosecution dismissed for the reasons set forth under subdivisions V, VI, and VII of this brief.

Respectfully submitted,

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